85-1081

Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA M. BOURKE

Petitioners,

v.

EAST BAY REGIONAL PARK DISTRICT *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE SUPREME COURT

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ATTORNEY IN PRO PER
COUNSEL OF RECORD

QUESTION PRESENTED

Did the California Supreme Court deny the Petitioner due process and equal protection of the laws when it permitted litigation in which she had a vested property right to be dismissed as a result of a novel interpretation of a procedural rule by the California District Court of Appeal, but then at the same time acted so as to prevent any other case from suffering a dismissal under that same novel interpretation by issuing an order which decertified the decision of the appeal court for publication?

PARTIES

The plaintiff in this action is Patricia M. Bourke, a taxpayer, who brought the within taxpayer suit against the California State Department of Transportation, East Bay Regional Park District, and the City of Oakland. The suit sought to set aside, as contrary to the California State Constitution, a certain sale of public lands by the California State Department of Transportation to the East Bay Regional Park District, which entity, in turn, had leased the same to City of Oakland. Hence, each were named as defendants in the suit. The California Supreme Court is also named inasmuch as it was its order affirming the outright dismissal of the taxpayer suit, while at the same time decertifying the opinion of the District Court of Appeal, which forms the basis for the raising of a Federal Consititutional Question.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PATRICIA M. BOURKE,

Petitioner,

vs.

EAST BAY REGIONAL PARK DISTRICT. etc., et al

>>

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

>>

Petitioner, Patricia M. Bourke, respectfully prays that a Writ of Certiorari issue to review the order of the California State Supreme Court rendered on September 19, 1985.

OPINIONS BELOW

The decertified opinion of the California District Court of Appeal in the within case is set forth at pages 1a through 14a of the Appendix.

The Order of the Supreme Court of the State of California Denying Hearing and decertifying that opinion is set forth at page 15a of the Appendix.

JURISDICTION

The Order Denying Hearing by the California Supreme Court was rendered on September 19, 1985. Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257, (3)

> "By Writ of Certiorari...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution..."

STATEMENT OF THE CASE

The underlying taxpayer suit arose as a result of the Petitioner's attempt to purchase a tiny triangular parcel of land which had deprived her property of any rear road frontage thereby preventing its development. While investigating the ownership of this land and seeking to procure the sorely needed tiny parcel, the Petitioner discovered that the parcel in issue was only a small portion of 17 acres m/l which the California State Department of Transportation ("Cal-Trans") was to sell to East Bay Regional Park District for use as a "green belt" or bicycle trail. (2a) Because the sale involved high-level political collusion, the price to be paid was but a fraction of the actual market value of the land. Petitioner further discovered that as a result of this failure to pay market value the sale contravened two separate provisions of the California

State Constitution.

Since the entities involved rebuffed every effort to buy the tiny, sorely needed parcel, the only method by which Petitioner could have any opportunity to acquire it was the within taxpayer suit to void the sale and force the California State Department of Transportation to offer it to abutting landowners pursuant to their regulations. *1/

By the same token, California law provided that persons bringing such taxpayer suits are entitled to their attorney fees, costs and expenses if they prevail thereby rendering a real benefit to the agency involved. *2/

Accordingly, and in reliance upon these state laws and regulations, Petitioner filed this taxpayer suit on July 25, 1975. In December, 1975 as a result of

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*1 See Appendix page 21a
*2 Calif. Code Civil Proced. 526a, 1021.5

a Demurrer filed by the Defendants on an erroneous legal ground that she had "failed to state a cause of action", the suit suffered a dismissal with prejudice. In January, 1976 Petitioner filed an appeal in the California District Court of Appeal. The trial court's dismissal was reversed by an unpublished opinion of the District Court of Appeal, and on Jan. 3, 1978 a remittitur was issued so that Petitioner could continue to pursue her action. (3a)

During the past 10 years the Petitioner has expended thousands of dollars as well as substantial time in pursuing this said taxpayer suit. In so doing Petitioner has retained associate attorneys, law clerks, researchers, secretaries and others to assist her. She has also expended hundreds of dollars for expenses apart from the salaries and wages of these assistants. In addition, she herself has spent hundreds of hours in

preparing documents, briefs, motions, consulting appraisers, and in doing research and in engaging in discovery and in appearing in court. All of the foregoing was done in good faith reliance on the merits of her action and the potential benefits and rights established under state law.

After having engaged in extensive discovery, and having the benefit of the opinion of the District Court of Appeal from the first appeal, which settled the law of the case, Petitioner on December 30, 1980 filed a Motion for Summary Judgment.

However, on January 6, 1981, before Petitioner's Motion for Summary Judgment could be heard, the Defendants filed a Motion to Dismiss under California Code of Civil Procedure Section 583(c) claiming that the California State Supreme Court case of McDonough Power Equipment Co. v. Superior Court of Los Angeles County (1972)

8 C. 3d 527, 105 Cal Rptr 330 required a dismissal of this taxpayer because supposedly, under that case, Petitioner had only three years after the remittitur to bring the case to trial or suffer a mandatory dismissal of this taxpayer suit. (4a).

While this Motion to Dismiss pended, the Petitioner's Motion for Summary Judgment was heard and granted. The sale of the entire 17 acres by California State Department of Transportation to East Bay Regional Park District was voided as contrary to the State Constitution, and all of the lands were ordered reconveyed to Cal-Trans, thereby demonstrating the obvious merit of Petitioner's underlying taxpayer suit. (14a)

However, on January 16, 1981, the hearing was had on the Defendant's Motion to Dismiss by a different trial judge, and it too was granted!

All parties filed appeals with the California District Court of Appeal. The Petitioner appealed from the dismissal, the Respondents appealed from the grant of the Summary Judgment. (4a, 14a)

In the meantime, the case of Bergin v. Portman (1983) 141 CA 3d 23, 190 Cal. Rptr. 81, was decided by another California District Court of Appeal. The procedural history was legally the same as the within taxpayer suit. This case cited the California State Supreme Court case of McDonough (supra) as standing for the proposition that cases coming after the 1972 amendment (as the within taxpayer suit does) are to be accorded a full five year period, exclusive of time on appeal, to bring a matter back for trial.

However, when the within matter came before the District Court of Appeal, it affirmed the dismissal of the within taxpayer's suit, notwithstanding this well-

reasoned authority directly on the point. In so doing, it was unable to distinguish the Bergin (supra) case on the facts, so it simply disapproved it. (12a) This interpretation of the mandatory dismissal statute was contrary to the language of the statute, *3/ contrary to Bergin (supra), contrary to the plain language of the McDonough (supra), and contrary to recognized California authority. *4/ This opinion was ordered published by the District Court of Appeal and appeared as: Bourke v. East Bay Regional Park District, et al (1985) 169 CA 3d 169, with the result that it became a precedent binding on trial courts. The practical effect of this novel decision was to retroactively shorten the mandatory dismissal statute for cases with the within procedural history by as many as 18 months!

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*3 See Appendix pages 16a, 17a, 18a
*4 See Appendix pages 19a, 20a

Under the rules*5/ governing the California Supreme Court, it is to hear cases where there is a conflict between decisions of different courts of appeal and cases which present important issues. The within matter fulfilled both criterion.

Nonetheless, despite all these factors the California Supreme Court on September 19, 1985, denied Petitioner a hearing, but directed that the opinion in Bourke v. East Bay Regional Park (supra) not be published in the Official Appellate Reports.*6

The result of this order of the California State Supreme Court was to affirm the outright dismissal of Petitioners taxpayer suit, but to permit other, future cases to be governed by the diametrically opposed interpretation of the applicable statute as found in Bergin v. Portman (supra) which interpretation would

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*5 Court Rule 29

*6 See appendix page 15a for Order Denying Hearing

have accorded the Petitioner another 18 months to bring her matter to trial, instead she was singled out for outright dismissal.*7

Petitioner was thereby deprived of any opportunity to complete her action, to recover any attorney fees or expenses, was denied any opportunity to acquire this tiny parcel of land, and was moreover thereupon assessed all of Respondents' costs.

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*7 Interestingly, Hon. Stanley Mosk's dissent in McDonough (supra) took the position that cases such as Petitioner's should not suffer dismissal with or without the 1972 amendment, yet he apparently voted with the majority to dismiss Petitioner.

JURISDICTION

A PROPERTY RIGHT CREATED BY STATE LAW WAS ABROGATED THEREBY INVOKING THE 14th AMENDMENT PROTECTIONS.

As has been demonstrated, the California Supreme Court denied the Petitioner a hearing causing the outright dismissal of her taxpayer's suit, but at the same time by decertifying the novel interpretation of the District Court of Appeal, this necessarily meant that Petitioner's action had been singled out to suffer a dismissal under such an interpretation of the mandatory dismissal statute. Furthermore every inference indicates that this decertification for publication occurred because the Supreme Court of California determined that District Court of Appeal's decision to affirm the dismissal of Petitioner's taxpayer suit was wrong.

Consequently, Petitioner has been deprived of the Equal Protection of the

Laws and Due Process under the United States Constitution. Petitioner alleges that she had a vested property interest in and to the taxpayer's which suit had obvious merit because of the fact that a Summary Judgment already had been granted in her favor. By causing an outright dismissal of the action, she suffered the loss of all the time, effort, and money she had expended in pursuing it, and further was deprived of any right to be paid attorney fees she had incurred or to obtain any opportunity to acquire the small parcel of land.

The U.S. Supreme Court has recognized that property rights most commonly have their source in state laws, and upon having been thusly created, such property rights may not be then taken away without observing the constitutional protections of the Fourteenth Amendment to the U. S. Constitution. Demorest v. City Bank

Farmers Trust (1944) 64 S. Ct. 384, 321 U.S. 36, [illegible] Ed. 526. "In recent years, due process protection has grown far beyond traditional concepts of tangible or intangible property. Expectations of 'entitlement' to various public benefits and employment are now protected as well. State law remains the primary source of identifying claims to entitlement against the states." Wright, Miller, Federal Practice and Procedure" Sect. 4030, page 759. This conclusion is fully substantiated by case law.

In the case of Logan v. Zimmerman Bush Co. (1982) 102 S. Ct. 1148, 1155, 455 U.S. 422, 71 L. Ed. 2d 265, the court said:

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." ...for example where a plaintiff's claim had been dismissed for failure to comply with a trial court's order-the Court read the 'property' component of the Fifth

Amendment's Due Process Clause to impose 'constitutional limitations' upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." (citations) "Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants the use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights". (citing Boddie Connecticut (1971) 401 U. S. 371.) (p. 429-430)

It was further the conclusion of the Supreme Court in the Logan case (supra) that it had been affirmatively settled that: "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause".(p. 428)

Indeed, if the local procedures involved in a 10 day suspension from High School can be an invasion of a property interest worthy of recognition by the United States Supreme Court, then surely a meritorious taxpayer's suit which had consummed more than ten years of time, money and effort ought to be a property

right worthy of protection from an arbitrary dismissal under the Fourteenth Amendment of the United States Constitution. Goss v. Lopez (1975) 95 S. Ct. 729, 419 U.S. 565, 42 L. Ed 2d 725; also see Board of Regents v. Roth (1972) 92 S. Ct. 2701, 408 U.S. 564, 33 L. Ed. 2d 548.

THE FEDERAL QUESTION HAS BEEN RAISED AT THE FIRST OPPORTUNITY

The abrogation of due process and equal protection herein asserted occurred only when the California Supreme Court, on one hand, permitted Petitioner's case to be dismissed, and then by decertifing the District Court of Appeal's decision insured that no future case having the same procedural history would suffer any dismissal on the same grounds.

Had the California Supreme Court not decertified the District Court's opinion, there would have been no federal question.

It is commonly known that states are free to misconstrue, reinterpret, or even to retroactively change the state's laws without a federal issue being involved. King v. West Virginia (1910) 30 S. Ct. 225, 216 U. S. 92, 54 L. Ed. 396, Garner v. State of Louisiana (1961) 82 S. Ct. 248, 368 L. Ed. 157, Brickerhoff-Faris Trust & Savings v. Hill (1930) 50 S. Ct. 451, 281 U.S. 673, 74 L. Ed. 1107. The law, whether right or wrong, would have applied equally to everyone. Consequently, until receipt of that Supreme Court Order, no federal issue could have been raised. After it was received, the State of California's procedural law absolutely foreclosed any opportunity to raise it. A hearing having been summarily denied in the first instance, there is simply no provision for a "rehearing" at which the federal question could have been presented.

As will be discussed further hereafter, every inference supports the conclusion that this decertification was simply and obviously because the ruling of the District Court of Appeal was recognized by the California Supreme Court to be wholly erroneous. Yet, a hearing was denied. Petitioner's case was therefore intended to be the only case dismissed on such grounds. Petitioner could not have addressed any federal issue which would flow from such a disposition because no such act of the California Supreme Court was in any way predictable. This is especially the case when the law review articles written on the decertification process indicated that such is supposed to be used ONLY when the California Supreme Court agrees with the result reached by the District Court of Appeal, but for some reason disapproves of its reasoning. It was apparently taken

for granted that the California Supreme Court would not deny a hearing with the conscious intention of permitting the litigant before it to suffer the results of an erroneous ruling.*8

However, if as is the case here, the federal issue could not have been raised earlier, it may be timely if it is raised at the first opportunity which presented itself. Great Northern Ry. v. Sunburst (1932) 53 S. Ct. 145, 287 U.S. 358, 77 L. Ed. 360. Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930) 50 S. Ct. 451, 281 U.S. 673, 74 L. Ed. 1107. Eddings v. Oklahoma (1982) 102 S. Ct. 869, 455 U.S. 1034, 71 L. Ed. 2d 1. State Farm Mutual Auto Ins. Co. v. Duel (1945) 65 S. Ct. 573, 576-77, 324 U.S. 154, 160-161, 89 L. Ed. 812.

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*8 62 Cal. Law Rev. 309 (p. 314) (1974)
50 So. Cal. Law Rev. 1181 (p. 1185 note 20 and 24) (1977)
67 Cal. Law Rev. 788 (p. 819) (1979)
13 Santa Clara Lawyer 756 (p.764) (1973)

In such cases 28 U.S.C.A. 2106 is invoked and the matter may be vacated and remanded for further proceedings in the State Supreme Court Herb v. Pitcairn (1945) 65 S. Ct. 459, 464, 324 U.S. 117, 128, 89 L. Ed. 789. Wood v. Georgia (1981) 101 S. Ct. 1097, 450 U.S. 261, 61 L. Ed. 220. The U.S. Supreme Court has jurisdiction to, at least, vacate a state judgment for further proceedings if the federal question could not have been presented to the state courts before their proceedings concluded. Wright, Miller, Federal Practice and Procedure, p. 699 Sec. 4022. This is the only procedure available as to cases coming from California. Department of Motor Vehicles v. Rios (1973) 93 S. Ct. 1019, 410 U.S. 425, 35 L. Ed. 2d 398.

THE SUPREME COURT'S ORDER WAS NOT FOUNDED UPON ADEQUATE, INDEPENDENT STATE GROUNDS

When the jurisdiction of the U.S. Supreme Court is invoked to examine state action which allegedly abrogated a litigants constitutional rights, and it is found that, in fact, the litigant had a legitimate claim of entitlement to the property right claimed, the next issue is whether the litigant was deprived of that right by adequate, non-federal grounds. The United States Supreme Court then examines these procedural grounds, to determine whether they had fair and substantial support in furthering legitimate state interests. N.A.A.C.P. v. State of Alabama ex rel Patterson (1958), 78 S. Ct. 1163, 357 U.S. 449, 2 L. Ed. 1488. Henry v. State of Mississippi (1965) 85 S. Ct. 564, 379 U.S. 443, 13 L. Ed. 2d 408.

In many such cases, the constitutionally protected right was

allegedly lost by the litigant due to some purported default under state procedural law. First the U.S. Supreme Court examines the pertinent record to determine whether, in fact, there had been such "default", and secondly whether the gravity of the purported default when weighed against the right forfeited met the proper standard of due process and equal protection under the Fourteenth Amendment. N.A.A.C.P. v. State of Alabama, ex rel Flowers (1964) 84 S. Ct. 1302, 1308-1311, 377 U.S. 288, 296-302, 12 L. Ed. 2d 325. See also Wright, Miller, Cooper, & Gressman, Federal Practice & Procedure: (1977) Jurisdiction, Sec. 4027.

In the instant case, the Petitioner asserts that, in fact, she was not in default under state law and her action ought not to have been properly subject to dismissal for another 18 months. She further alleges that in decertifying the

opinion of the District Court of Appeal which affirmed the dismissal, the Supreme Court of California simply found the ruling and the result obtained to be wrong, but nonetheless arbitrarily permitted Petitioner to suffer the drastic result of an outright dismissal when it denied her a hearing.

However, it is recognized that the Order emanating from the California Supreme Court did not specifically say that it disapproved the result reached...it simply decertified the opinion for publication thereby insuring that this novel interpretation of the mandatory dismissal statute would not serve as precedent in future cases. *9/

In many cases, the opinion subject to such a decertification order could well

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Calif. Rules of Court 977(a); Powers v. Sissoev (1974) 39 CA 3d 865, 872 n.8, 114 Cal Rptr 868, 873 n.8

have involved multiple issues of law, dicta, technical facts or other aspects which would each lend themselves to as the possible reason WHY the California Supreme Court ordered that the opinion not be published. California law permits such decertifications to occur without any guide lines or criteria whatever...it is a matter of wholly unbridled discretion.*10/ By not giving any explanation for either its denial of hearing or the decertification, the party denied a hearing is ordinarily left to conjecture. Consequently, when a decertification order occurs in the typical case, there is usually no way to even reasonably infer that the Supreme Court disapproved the result. Hence, in the typical case, the Supreme Court is normally shielded from such constitutional challeges. After all,

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* 10/ Cal. Const. Art. VI Sec. 14; Cal. Rules Court 976.

somewhere in the complexity of the matter there "might" have been "adequate state grounds" to explain the decertification, without it appearing that the litigant suffered a wrong result.

This case does not provide such opportunity for obfuscation of the intent of the California Supreme Court. Rather, this case presented one, simple, straightforward issue: whether under C.C.P. 583 (b)(c) a case must be dismissed within 3 years following a remittitur on appeal, or, does the plaintiff have a minimum of 5 years, exclusive of time on appeal? There is no question but that the procedural history in each of the cases on point is legally indistinguishable.

By the same token, the law on this subject is not beclouded in technical distinctions, grey areas, or numerous conflicting authorities. The only "conflicting" aspect of the matter arose

when the District Court of Appeal issued its opinion in this case. That opinion contradicted Witkin, *11/ disapproved, but could not distinguish Bergin v. Portman, and patently misinterpreted the plain language and intention of the California Supreme Court about this very issue as expressed in McDonough (supra).

Petitioner's conclusions in this regard are hardly speculations or conjecture...and anyone schooled in the law who reads the code section, McDonough (including dissent), Bergin, and the decision of the District Court of Appeal in the within case would come to the inescapable conclusion that the only reason for decertification was that both the reasoning and result reached by the District Court of appeal were wrong.

Indeed, had the opinion in the within case (shortening the time for mandatory

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* See Appendix pages 19a, 20a

dismissal by as many as 18 months retroactively) been published making it a precedent binding on the courts, disasterous consequences would have befallen an untold number of plaintiffs with meritorious cases whose attorneys (like Petitioner) relied upon what appeared to be settled law on the issue. The opinion of the District Court of Appeal was not only wrong, it was an irresponsible abberation.

What one is left to conjecture about is just WHY did the California Supreme Court elect to permit this Petitioner to suffer the drastic result of an outright dismissal when she was not in default and for a reason which was just not the law?

Into just what unfortunate classification did this Petitioner's case fall? Certainly, it could not be because her underlying case was frivolous or lacked merit...a Summary Judgment had

already been granted to her. Could it be that the high-level political collusion which led to this illegal sale of public lands have reached all the way into the courts? Was the local trial court's dismissal and the subsequent affirmations of it simply a means to get rid of a cause which was politically unpopular? The use by state courts of purported defaults under novel procedural rules as an excuse to evade the rights of select litigants is not unheard of in the annals of jurisprudence. N.A.A.C.P. v. State of Alabama ex rel Flowers (supra), N.A.A.C.P. v. State of Alabama ex rel Patterson (supra).

Or, is what we have here simply an instance of judicial "discretion" based upon nothing more substantial or sinister than court convenience and simple expediency? Did the California Supreme Court deny a hearing, thereby sacrificing

Petitioner's ten years of expense, effort, and justified expectations, just because of their "heavy case load"?

For a state's highest court to permit the drastic result of an outright dismissal of an obviously meritorious case, while, at the same time taking overt steps to tidy up things so as to insure that others with the same procedural history will not be similarly mistreated in the future, would seem on its face to deny equal protection under the U.S. Constitution. By the same token, that unconstitutional effect is hardly assuaged by lamentations about the "large caseload" of the Supreme Court. It would seem that such considerations do not render such discrimination as having any "adequate" basis in state law. In the case of Laurence v. State Tax Commission of Mississippi (1932) 52 S. Ct. 556, 286 U.S. 276, 76 L. Ed. 1102, the U.S. Supreme

Court held:

> "...the constitution, which guarantees rights and immunities to the citizen likewise insures him the privilege of having those rights and immunities judicially declared and protected when judicial action is properly invoked... his constitional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it...for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked." (p. 558)

In fact, the California Supreme Court has held that both state and federal constitutions require that persons similarly situated with respect to the legitimate purposes of the law must receive like treatment unless there is some rationality in the nature of the class which has been singled out.*

"Too busy to be bothered" would hardly seem to rise to the standard of "rationality" envisioned by the U.S. Constitution.

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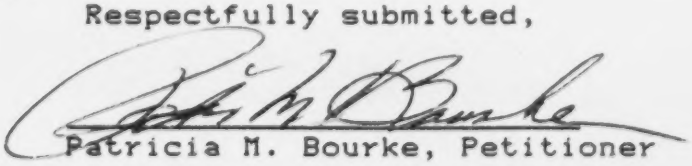
* Brown v. Merlo (1973) 8 C. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212,

CONCLUSION

By use of its unbridled discretionary power to "decertify" decisions of the appeal courts, the Supreme Court can permit a wrong result to stand, while at the same time sweeping the law which created that result "under the rug", so that no other future litigants would be bound by the unfortunate ruling. In so doing, it seems self-evident that such acts undermine the predictability and integrity of the law which is supposed to apply to every one equally. The practice would seem almost by definition to violate fundamental concepts of equal protection and due process. Petitioner therefore asks that the order be vacated and the matter remanded for further proceedings before the State Supreme Court so that the Constitutional issues may be considered.

Respectfully submitted,



Patricia M. Bourke, Petitioner

APPENDIX

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PATRICIA M. BOURKE,	]	A0148363
	]	
Plaintiff, Appellant	]	Sup. Ct. No. 467617-5
	]	
v	]	
	]	
EAST BAY REGIONAL PARK DIST., et al	]	Filed June 12, 1985
	]	
Defendants and Appellants	]	
	]	

In applying Code of Civil Procedure section 583.320 (former Sec. 583, subd. (c)).[1/] a hearing after a demurrer constitutes a trial when the ruling results in a judgment of dismissal. Following an appeal and a remittitur reversing that

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1/ the dismissal statutes were repealed and reenacted as Code of Civil Procedure section 583.310 et seq. in 1984 without any substantive changes. (Stats. 1984, ch. 1705, Sec. 4, p. 925; Stats 1984, ch 1705, Sec. 5 pp. 925-928. All section references are to the Code of Civil Procedure unless otherwise stated.

judgment, dismissal of the action is mandatory when a new trial has not been brought within three years. The five-year provision of section 583.310 (former Sec. 583 subd. (b)) to bring an action to trial for the first time is not applicable.

Plaintiff Patricia Bourke appeals from a judgment of dismissal for failure to bring the case to trial within three years after issuance of the remittitur as provided in section 583.320. We affirm.

The California Department of Transportation (Caltrans) sold excess property previously acquired for state highway purposes to East Bay Regional Park District, to be leased by the City of Oakland for its Shepard Canyon corridor plan. Under this plan, Oakland constructed bicycle paths and hiking trails upon the land, which alleviated congestion from pedestrians and increased the traffic capacity of approximately parallel city

streets. On July 25, 1975, Plaintiff instituted a taxpayer's suit to set aside the sale of the land, contending it was an unconstitutional give of public funds and an impermissible diversion of motor fuel tax revenues. Demurrers to the complaint were sustained with leave to amend; plaintiff filed an amended complaint containing the same allegations. On December 10, 1975, the trial court sustained a second demurrer without leave to amend and entered a judgment of dismissal. Plaintiff appealed and this court issued an opinion on November 3, 1977, affirming the dismissal of the first and third causes of action, but reversing the dismisal of the second cause of action. (Bourke East Bay Regional Park Dist. (Nov. 3, 1977) 1 Civ. No. 38887.) The opinion became final on January 3, 1978, and the remittitur was issued on the same date.

On October 2, 1978, plaintiff filed a

second amended complaint. Trial was set for July 21, 1980. On July 10, 1980, plaintiff moved for a continuance over defendants' opposition. The trial court granted the motion and continued the trial to August 21, 1980. Thereafter, upon plaintiff's request, the parties agreed to drop the matter from the civil active list. On January 6, 1981, more than three years after the issuance of the remittitur on January 3, 1978, defendants moved to dismiss the complaint for lack of prosecution pursuant to the mandatory three year period of section 583.320. The motion was granted and judgment of dismissal was entered on January 21, 1981. Plaintiff's motion for a new trial was denied and she filed a timely appeal.

In this appeal, plaintiff contends that by reading together sections 583.310, 583.320, subdivision (a)(3) and 583.340, subdivision (a) (former Sec. 583, subd.

(f)), one must conclude that the five-year umbrella period of section 583.310, controls over the three-year period of section 583.320, subdivision (a) (3), and that plaintiff had five years from the time the complaint was filed, excluding the two years the case was on appeal, in which to bring the case to trial. In effect, plaintiff argues that the five-year statute of limitations was tolled for the two years the case was on appeal and that she is entitled to an additional two years to prosecute her complaint.[2/] In opposition, defendants allege that a "trial" occurred within the meaning of section 583.310 when the judgment of dismissal was entered after the demurrer was sustained without leave to amend, and therefore the five year period

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2/ The notice of appeal was filed on Jan. 13, 1976. The opinion was filed on November 3, 1977, and the remittitur was issued on January 3, 1978.

is inapplicable./3

In support of their respectiv contentions, both sides rely on our Supreme Court's decision in McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527. There, Plaintiff Mary Grasso sued defendant McDonough Power Equipment Company for personal injuries. The trial court sustained a demurrer without leave to amend and entered a judgment of dismissal. Plaintiff appealed and the Court of Appeal reversed the judgment with directions to

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3/ Former section 583, subdivision (b) provided in pertinent part: "Any action...shall be dismissed by the court...unless such action is brought to trial within five years after the plaintiff has filed his action..." (see ante, fn. 1)

Former section 583, subdivision (c) provide in pertinent part: "When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial...the action must be dismissed by the trial court, on motion of defendant after due notice to Plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court..." (Emphasis added: see ante, fn. 1.)

overrule the demurrer. The cause came up for trial more than three years following the issuance of the remittitur and defendant moved to dismiss the action under the statutory forerunner of the three-year provision of section 583.320, subdivision (a) (3). The trial court denied the motion and defendant petitioned for a writ of mandate to compel dismissal. The Supreme Court granted the writ. In its decision, the McDonough court held that the dismissal of the action is mandatory unless the action is brought to trial within three years following the issuance of the remittitur. (Id. at pp. 530-531) The court expressly rejected the same contention that plaintiff herein raises, i.e. that upon reversal of the judgment of dismissal, the action is reinstated under the umbrella of the five-year provision of the statute. (Id. at p. 533). In reaching this conclusion, the court reasoned that the

five-year provision applies only when there has been no trial. The court held, consistent with cited authorities, that when a demurrer has been sustained and a judgment of dismissal has been entered there has been a trial and the five year period is inapplicable. (Id. at pp. 532-533).

Despite this unequivocal language, plaintiff herein claims that such an approach would work to the detriment of the diligent litigant who brings the case to trial, appeals an adverse judgment and obtains a reversal with the remittitur issuing all within two years from filing the complaint. Plaintiff argues that under this scenario, section 583.320, subdivision (a) (3) requires a litigant to bring the case to trial within three years following the issuance of the remittitur, even though such period is less than five years from the filing of the complaint. She relies

upon the reference in McDonough Power Equipment Co. v. Superior Court. (supra) to the 1972 amendment to former section 583 which noted the addition of the following language to subdivision (c) (now sec. 583.330. subd. (b)): "Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b)." (8 Cal. 3d at pp. 533-534, fn. 5.) Relying on this language, she contends that the court impliedly recognized that the 1972 amendment brought the three-year provision under the umbrella of the five-year provision, excluding the time the case is on appeal. This is an incorrect reading of the opinion. The McDonough court recognized that in some cases where a judgment is speedily obtained, the result which Plaintiff complains of may occur. The court noted that the Legislature provided a remedy for this in its 1972

amendment to former section 583, subdivision (c), the effect being to give plaintiff either five full years from the filing of the complaint in which to bring the case to trial, or three years after issuance of the remittitur, whichever period is greater. However, the court went on to distinguish those rare instances, described immediately above, which penalize the diligent litigant against the specified procedural events at bar where there has been a "trial". Here, as in McDonough, the five-year period is inapplicable. (Id., at pp 532-533)

Plaintiff relies on Bergin v. Portman (1983) 141 Cal. App. 3d 23, 26 for a contrary position. In Bergin, a complaint for specific performance was filed on July 21, 1976. Summary Judgment was entered for plaintiffs, but was reversed on appeal. The remittitur was issued on May 12, 1978. On May 21, 1981, more than three years

later, the parties stipulated to schedule the trial on a date which was more than five years after the filing of the complaint. On August 3, 1981, defendant moved to vacate the trial date and to dismiss th action on the alternative grounds that the plaintiff failed to bring the case to trial within five years after filing the complaint or three years after the remittitur was issued. (Former Sec. 583, subds. (b) (c).) Judgment was entered dismissing the action under the three-year provision. (Id., at p. 25.) Relying on former section 583, subdivision (f) (now sec. 583.340, subds. (a), (b), the Bergin court concluded that the time the case was on appeal must be excluded from the five year period specified in former section 583, subdivisions (b) (c), with the result that plaintiffs had an additional one year and sixteen days in which to bring their case to trial. (Id. at p. 26.)

The situation in Bergin is similar to that of the plaintiff in McDonough and in the case at bar, except that in Bergin, the plaintiffs appealed from a summary judgment, whereas here and in McDonough, the appeal is from a demurrer without leave to amend. A summary judgment is as much a determination of the law as a demurrer and if the equivalent of a trial for the purposes of the dismissal statutes. (See McDonough Power Equipment Co. v. Superior Court (supra) 8 Cal. 3d at pp. 531-532.) The Bergin court did not distinguish McDonough and we are unable to discern any legal distinction. We are bound by the Supreme Court's opinion in McDonough (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455)., and hold that upon the issuance of a remittitur following a demurrer, summary judgment, mistrial, or other proceeding on the merits, a plaintiff has three years in which to bring the case

to trial.

Plaintiff refers to 4 Witkin, California Procedure 2d ed. 1983 Supp.) Proceedings Without Trial, section 114, page 54, wherein the author states that the 1972 amendment to section 583, subdivision (c) nullifies the effect of McDonough. The author also directs us to a discussion in 4 Pacific Law Journal 316. There, the editors comment that, as amended, former section 583, subdivision (c) "eliminates this inequity by providing that the three year limitation in such cases does not supersede the overall five year limitation."

We find nothing unfair about requiring plaintiffs whose cases have been "tried" once, either by summary judgment, demurrer, or full trial, to conduct a retrial within three years after remittitur is filed. These liitigants have already had one opportunity to have issues of fact or law

decided and brought to a final disposition. (See McDonough Power Equipment Co. v. Superior Court (supra), 8 Cal. 3d at p. 532.) They stand in a qualitatively different position from plaintiff, whose cases have had no adjudication on the merits and thus no "trial". When there has been no determination of issues of fact or law (cf Tiholiz v. Superior Court (1980) 104 Cal. App. 3d 201; Briley v. Sukoff (1979) 98 Cal. App. 3d 405), then the plaintiffs have five years to bring the case to trial, excluding the time spent on appeal.

In light of our conclusion, it is not necessary to address defendants' cross-appeal from the order granting plaintiff's motion for partial summary judgment.

The judgment of dismissal is affirmed.

Low. P.J.

We concur:

King, J.

Haning, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 5, No. A014863

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BOURKE, Appellant,

v.

EAST BAY REGIONAL PARK DISTRICT et al., Appellants.

SUPREME COURT
FILED
SEP 19 1985
Lawrence P. Gill, Clerk

DEPUTY

Petition for review of appellant Bourke DENIED.

Bird, C.J., is of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal which was filed June 12, 1985, and appears at 169 Cal.App.3d 169. (Cal. Const., Art. VI, Section 14; Rule 976, Calif. Rules of Court.)

Bird, C.J., is of the view the opinion should remain published.

Bird

Chief Justice

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 583

Dismissal; lack of prosecution; failure to bring action to trial:

(a)...

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

(c)...When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial...the action must be dismissed by the trial court, on motion of defendant after due notice to Plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. **Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).**

(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.

(The foregoing is the statute as of 1976, and remained so until 1984, the highlighted language was the amendment added in 1972).

CALIFORNIA PROCEDURAL STATUTE
IN PERTINENT PART
(1984 VERSION)

SEC. 583.310 **Time to bring action to trial**

An action shall be brought to trial within five years after the action is commenced against the defendant.

SEC. 583.320 **New trial; time to bring action to trial**

(a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310.

Sec. 583.340. **Computation of time**

In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

Sec. 583.350 **Dismissal on motion of court or defendant; mandatory nature of article**

(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) the requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

(i) [§114] Statutory Rule.

A 1972 amendment removed this material from subdivision b; it is now C.C.P. 583(c).

The statute applies not only where there is a reversal after trial on the merits but also where there is a reversal of a judgment of dismissal following the sustaining of a demurrer without leave to amend. (*McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 532, 105 C.R. 330, 503 P.2d 1338.)

(New) Where total 5-year period has not elapsed: In *McDonough Power Equipment Co. v. Superior Court*, supra, G sued M Co. for damages for personal injuries. The complaint was filed in June, 1965; a demurrer was sustained without leave to amend in November, 1965, and judgment of dismissal was entered in December, 1965. Plaintiff appealed, the judgment was reversed, and the remittitur was filed in October, 1968. Defendant answered in January, 1969, and the case came on for trial in July, 1971, but was continued to November 2, 1971. At this time defendant moved to dismiss under C.C.P. 583(b). The trial court denied the motion. *Held*, mandamus granted to compel dismissal.

Plaintiff's main contention was that, despite violation of the 3-year period after reversal provision, there was a larger umbrella protecting it until expiration of the total 5-year period starting from filing of the complaint (which had not run because the time spent on appeal is excluded, see text, §103). The court, relying on the clear language of the statute, rejected the argument, but observed that the Legislature had accepted it for the future. (8 C.3d 534, footnote 5.)

The 1972 amendment of C.C.P. 583(c), nullifying the result in *McDonough*, states: "Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b)." (See 4 Pacific L. J. 316.)

(3) [§178] Where 5-Year Period Not Elapsed.

(a) *Former Law.* In *McDonough Power Equipment Co. v. Superior Court* (1972) 8 C.3d 527, 105 C.R. 330, 503 P.2d 1338, G sued M Co. for damages for personal injuries. The complaint was filed in June, 1965, a demurrer was sustained without leave to amend in November, 1965, and judgment of dismissal was entered in December, 1965. Plaintiff appealed, the judgment was reversed, and the remittitur was filed in October, 1968. Defendant answered in January, 1969, and the case came on for trial in July, 1971, but was continued to November 2, 1971. At this time, defendant moved to dismiss and the trial court denied the motion. *Held,* mandamus granted to compel dismissal.

Plaintiff's main contention was that, despite violation of the 3-year period after reversal provision, there was a larger umbrella protecting it until expiration of the total 5-year period starting from filing of the complaint (which had not run because the time spent on appeal is excluded, see supra, §140). The court, relying on the clear language of the statute, rejected the argument, but observed that the Legislature had accepted it for the future. (8 C.3d 534, footnote 5.)

The 1972 amendment of former C.C.P. 583(c), nullifying the result in *McDonough,* states: "Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b)." (See 4 Pacific L. J. 316; *Bergin v. Portman* (1983) 141 C.A.3d 23, 26, 190 C.R. 81.)

In *Balboa Ins. Co. v. Aguirre* (1983) 149 C.A.3d 1002, 1006, 197 C.R. 250, the action was not brought to trial within the 3-year period of former C.C.P. 583(d), dealing with delay after mistrial or jury disagreement (see supra, §171). Plaintiff contended that the 5-year overall period, which had not run, should govern, just as in reversals on appeal under former C.C.P. 583(c). *Held,* order of dismissal affirmed. The *McDonough* case, supra, held that legislation was necessary to make the 5-year period applicable. Such legislation was enacted for new trials after reversals on appeal, but not for new trials after mistrial. (149 C.A.3d 1007, 1008.)

(b) *Revised Law: 5-Year Period Governs.* C.C.P. 583.320(b), applicable to all of the types of delay in new trial (supra, §171 et seq.), states that "Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310."

DIRECT SALE TO ADJOINING OWNER— FINDINGS "A" AND "B"

12.241 General Policy

The following resolution passed by the California Transportation Commission on May 17, 1945, governs the disposition of small, odd-shaped, fee-owned parcels to adjoining owners without calling for competitive bids:

"Resolved by this Commission:

1. In the disposal by sale of excess fee-owned parcels, not needed for highway purposes pursuant to Section 118 of the Streets and Highways Code, the Department is hereby authorized, upon the terms and conditions hereinafter set forth, to sell the excess parcel to the owner of adjoining property without the necessity of calling for competitive sealed bids or selling same at public auction, whenever the Department finds and determines that all of the following facts either under Finding "A" or "B" exist pertaining to such excess parcel:

   Finding "A"

   That the excess parcel is of such size or shape that it is below the average normal standard size and shape of other privately owned properties in the immediate neighborhood, and that if such parcel were sold to other than the adjoining owner, it would give rise to land use development thereof which would be below and not consistent with the normal land use of such other properties in that neighborhood;

   That the sale of such parcel to a party other than the adjoining owner may cause an undue or unfair hardship to such adjoining owner in the normal land use development or operation of his property;

   That such parcel considered as a part of the adjoining property would have a higher and better use than under separate ownership; and

   That the fair market value of such parcel considered as a part of the adjoining property would be higher than under separate ownership; or

   Finding "B"

   That the sale of such excess parcel to other than the adjoining owner would deprive such adjoining owner of an existing vested right of access to a public highway and thereby create a possible cause of action against the Department.

2. Upon making either Finding "A" or "B" as above set forth, the Department may sell the excess parcel to the owner of the adjoining property for a consideration which shall not be less than the appraised fair market value of such parcel considered as part of such adjoining property.